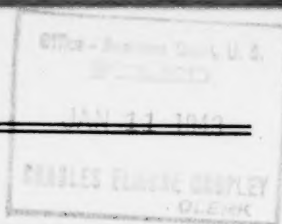


(21)



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942

No. 644

HENRY HITT, Trading as Congressional Garage,  
CENTURY INDEMNITY COMPANY, a Corporation,  
*Petitioners,*

*vs.*

FRANK A. CARDILLO, Deputy Commissioner for the District  
of Columbia, United States Employees' Com-  
pensation Commission,  
WANDA V. HERLINGER, Intervenor,  
*Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DIS-  
TRICT OF COLUMBIA

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January 11, 1943.



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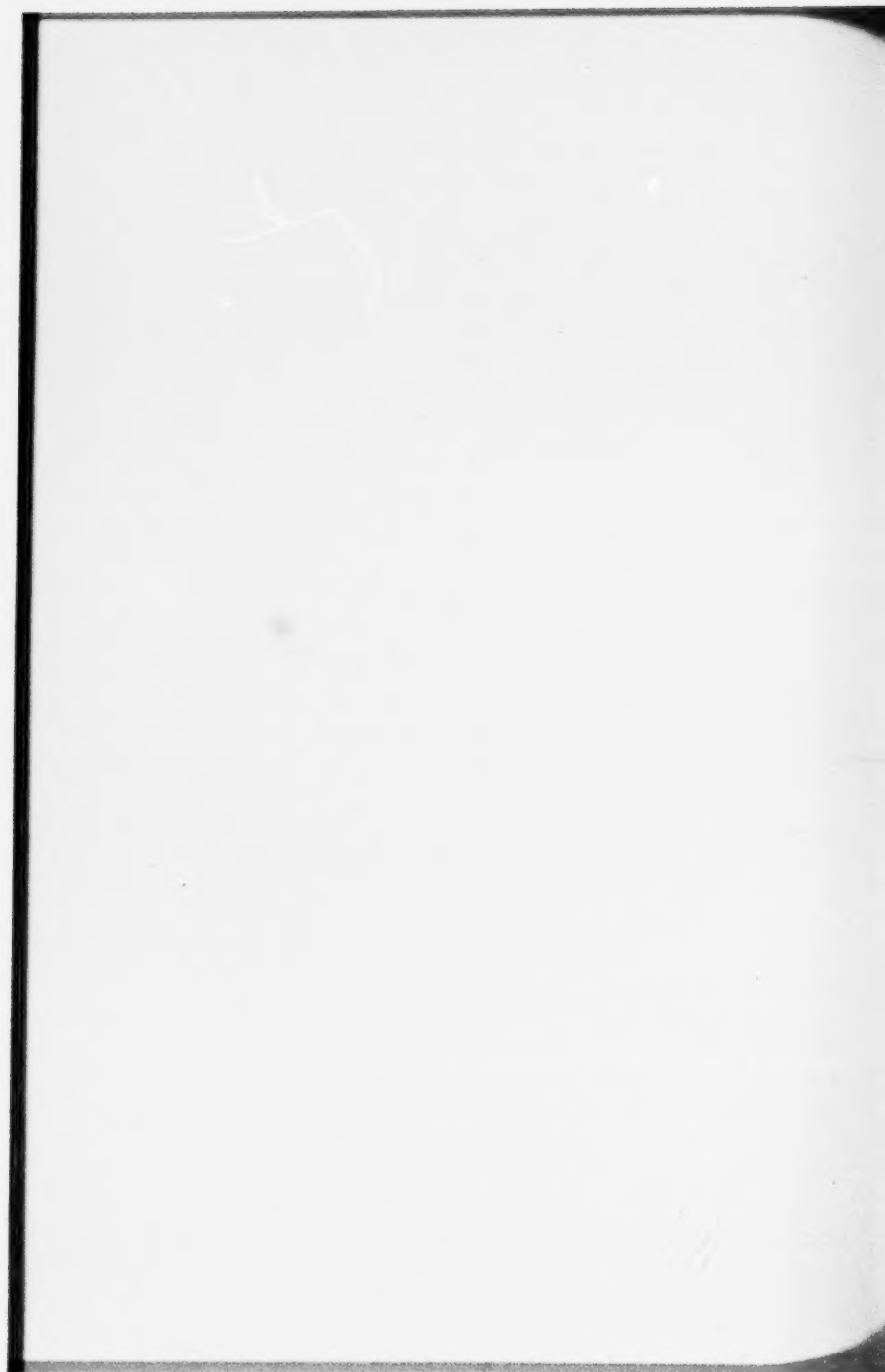
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DIS-  
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The petitioners, Henry Hitt, trading as the Congressional Garage, and the Century Indemnity Company, a corporation, respectfully pray for a Writ of Certiorari to review the decision (R. 19) and judgment (R. 22) of the United States Court of Appeals for the District of Columbia, entered on October 26, 1942, affirming the judgment (R. 16) of the District Court of the United States for the Dis-

trict of Columbia, sustaining a Motion to Dismiss petitioners' Complaint for Injunction and finally dismissing that Complaint.

### THE OPINIONS BELOW

The opinion of the District Court (R. 17) is not reported. The opinion of the Court of Appeals was entered on October 26, 1942 (R. 19) and is reported in 131 F. 2d. 233.

### SUMMARY STATEMENT

Petitioner, Henry Hitt, in 1934 was trading in the District of Columbia under the title "Congressional Garage" (R. 2). Petitioner, Henry Hitt, was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia by an Act of Congress approved May 17, 1928.<sup>1</sup>

Petitioner, Century Indemnity Company, is a corporation, engaged in the insurance business and was the insurer of Henry Hitt on July 31, 1934 (R. 2, 3).

Harrison Herlinger, an employee of petitioner, Henry Hitt, was injured on July 31, 1934, through the negligence of a third party (R. 3). Harrison Herlinger elected to receive compensation under the provisions of Section 33(a) of the Longshoremen's and Harbor Workers' Compensation Act, thereby assigning to petitioners "all rights \* \* \* to recover damages against the third party" (R. 3). Petitioners instituted an action against the third party, whose negligence had caused Herlinger's injury, and recovered during the lifetime of Herlinger \$27,000.00 (R. 3). Herlinger was paid by petitioners as compensation, \$6,417.84 during his lifetime. In addition, advances were made by petitioners in the sums of \$5,870.39 and \$500.00 (R. 4, 12). Such advances were used by Herlinger and his wife, Wanda V. Herlinger, respondent and intervenor in the case below,

<sup>1</sup> 45 Stat. 600; District of Columbia Code, 1940 Edition, Title 36, Sections 501, 502; 33 U. S. C. A. 901 note.

to purchase a home (R. 4). In addition, petitioners paid the attorney's fees allowed by the Deputy Commissioner in connection with the third party action, and all medical expenses incurred for the care and treatment of Herlinger. Thus, out of the recovery of \$27,000 more than \$7,500.00 was paid Herlinger in compensation and by way of advances during his life time.

Harrison Herlinger died on September 5, 1939. After Herlinger's death, Wanda Herlinger, his surviving wife, qualified as Executrix under the Will of Harrison Herlinger, and filed a claim under the Compensation Act with respondent, Deputy Commissioner Cardillo, on her own behalf as widow and on behalf of two surviving minor children of deceased for compensation (R. 11). Mrs. Herlinger asserted that the balance of the third party recovery held by petitioners at the time of the death of Mr. Herlinger should be paid forthwith to her as his personal representative, and in addition, notwithstanding that petitioners had paid in excess of \$7,500.00 in compensation and advances to Mr. Herlinger during his lifetime, that additional compensation under the Compensation Act should be paid Mrs. Herlinger and the children because of the death of Mr. Herlinger.

Respondent, Deputy Commissioner Cardillo, found that Herlinger's death resulted from the injury of July 31, 1934 and held that petitioners were required to pay over immediately to Mrs. Herlinger the balance on hand from the third party recovery, and in addition thereto should commence to pay compensation to Mrs. Herlinger and the children (R. 6, 10, 11, 12).

Petitioners filed a Complaint for Injunction in the District Court of the United States for the District of Columbia against respondent, Deputy Commissioner Cardillo, contending that his award was not in accordance with law and was erroneous (R. 1-8).<sup>2</sup> Respondent, Mrs. Herlinger, in-

<sup>2</sup> As provided by Section 21 (b) of the Compensation Act; 33 U. S. C. A. 921b and approved by this Court in *Del Vecchio v. Bowers*, 296 U. S. 280, 283, footnote 3.

tervened in the action (R. 14). Respondents, the Deputy Commissioner and the intervenor, Mrs. Herlinger, filed a Motion to Dismiss petitioners' Complaint (R. 14-17). The District Court sustained the Motion to Dismiss petitioners' complaint for injunction and entered a final judgment dismissing the Complaint (R. 16, 17). Petitioners appealed from the judgment of dismissal to the United States Court of Appeals for the District of Columbia. (R. 19). On October 26, 1942 the Court of Appeals affirmed the action of the District Court in dismissing petitioners' Complaint (R. 19-22).

Petitioners make no claim of ownership to the balance of the third party recovery held by them and seek only proper credits and to distribute that fund according to law.

### JURISDICTION

The decision and judgment of the Court of Appeals was entered on October 26, 1942 (R. 19, 22). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 as amended, 44 Stat. 1432, 33 U.S.C.A. 914(m), providing that "The total compensation payable \* \* \* for injury or death shall in no event exceed the sum of \$7,500" permits the payment of \$7,500 for disability and, if death ensues thereafter, an additional payment of \$7,500.

2. Whether the definitions promulgated by Congress in the Act are controlling in interpreting subsequent provisions of the Act, or whether such definitions may be ignored at the will of the particular court interpreting the Act.

3. Whether, in the event \$15,000.00 in compensation is payable under the Act instead of \$7,500, for disability



and death, in view of the provisions of Wrongful Death Statute of the District of Columbia,<sup>3</sup> combining, in effect, actions for personal injuries with actions for wrongful death, can an employer and his insurance carrier utilize the proceeds of a third party recovery to pay compensation for disability and death.

4. Whether, in the event the employer and the insurance carrier may utilize the proceeds of the third party recovery for payment of compensation for disability and death, is the carrier entitled to a credit for advances made to the injured employee during his lifetime, and, which advances were used to purchase a home, now owned by the decedent's widow and intervenor.

#### STATUTES INVOLVED

Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1432, 33 U.S.C.A. 914(m) provides:

"The total compensation payable under this Act (chapter) for injury or death shall in no event exceed the sum of \$7,500."

Section 2(2) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. 902(2) provides:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

<sup>3</sup> Act of February 17, 1885, 23 Stat. 307, District of Columbia Code, 1940 Edition, Title 16, Section 1201.

Section 2(10) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1440, 33 U.S.C.A. 902(10) provides:

" 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 2(12) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. 902(12) provides:

" 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this Act (chapter), and includes funeral benefits provided therein."

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1440, 33 U.S.C.A. 933 provides:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employee is liable in damages, he may elect, by giving notice to the Deputy Commission in such manner as the Commission may provide, to receive such compensation or to recover damages against such third person."

"(b) Acceptance of such compensation (amended on June 25, 1938 by adding the words 'under an award in a compensation order filed by the Deputy Commissioner'), shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

\* \* \* \* \*

"(e) Any amount recovered by such employer on account of such assignment, whether or not as a result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise; \* \* \*;

(B) the cost of all benefits actually furnished by him to the employee;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation \* \* \* to be estimated by the Deputy Commissioner and the amount so computed and estimated to be retained by the employer to pay such compensation and the costs of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative;”

Section 14(k) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1432, 33 U.S.C.A. 914(k) provides:

“If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.”

The Wrongful Death Act of February 17, 1885, 23 Stat. 307, District of Columbia Code, 1940 Edition, Title 16, Section 1201, provides:

“Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife,

to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided*, That in no case shall the recovery under this title exceed the sum of ten thousand dollars: *And provided further*, That no action shall be maintained under sections 16-1201 to 16-1203 in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party."

#### REASONS FOR GRANTING THE WRIT

Several of the reasons usually advanced for allowing certiorari are present in this case. The court below has decided questions of general importance and questions of substance, relating to the construction or application of a statute of the United States, which have not been, but should be settled by this Court; has decided important questions of Federal law which have not, but should be settled by this Court; has decided important questions concerning a Federal statute in conflict with a decision of another Circuit Court of Appeals and with a prior decision of the court below, and has not given proper effect to a decision of this Court.

#### I

The Court of Appeals has decided that Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act provides for compensation totaling \$15,000, notwithstanding the plain language of the Act which states that the total compensation payable under the Act for *injury* (the term "injury" as defined in the Act includes disability or

death) shall *in no event* exceed the sum of \$7500. In placing that erroneous construction upon the Act the court below relied on the decisions of two other Circuit Courts of Appeal, *International Mercantile Marine Co. v. Lowe*, 93 F. 2d 663, and *Norton v. Travelers Ins. Co.*, 105 F. 2d 122.

We submit that the court below and the courts in the two cases cited have erroneously interpreted this important section of the Act.

The question involved as to the total limitation of compensation provided for in this Act, which is national in scope, is important, not only to employees and their dependents, but to employers and their insurance carriers as well. Insurance carriers generally have felt heretofore that the total compensation payable under this Act for injury and death is \$7500 and have predicated their insurance premiums upon that limitation. If insurance carriers are liable for a total payment of \$15,000 under this Act, rather than the sum of \$7500 as stated in the Act, then an early decision ought to be rendered by this Court construing the Act so that this controversy can be settled and insurance premiums adjusted accordingly. This Court has consistently held that questions concerning the interpretation and application of the provisions of the Compensation Act, even when involved in decisions of the United States Court of Appeals for the District of Columbia, are "national in scope," and constitute precedents of general application of sufficient importance to be decided on certiorari. *Del Vecchio v. Bowers*, 296 U. S. 280, 285; *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530, 537.

We submit that the decision of the court below and the decisions cited by the court in support of its interpretation of this Act do violence to the legislative history of the Act, the plain terms of the Act and disregard the statutory definitions contained in the Act.

The Act in question is entitled, "An Act to Provide Compensation for Disability or Death Resulting from Injury \* \* \*". In order that there might be no question as to the

meaning of vital words when used in the Act, Congress specifically defined those words in Section 2 of the Act. Section 2(2) defines the term "injury" to include accidental injury and death arising out of and in the course of employment. Section 2(10) of the Act defines "disability" to mean incapacity. Section 2(12) defines the term "compensation" to mean the money allowance payable to an employee or his dependents including funeral benefits. Thus, Congress definitely defined the meaning of the words "injury", "disability" and "compensation" when used in the Act. It is submitted that the decision below and the *Lowe* and *Norton* cases ignore those statutory definitions and give to the word "injury" a meaning other than that prescribed by Congress. The indubitable effect of those decisions is to define the term "injury" as used in Section 14(m) of the Act as synonymous with "disability" in order to enlarge the total compensation payable under the Act from \$7500 to \$15,000. Moreover Section 14(m) specifically states that the *total* compensation payable shall *in no event* exceed \$7500.

We submit that the term injury in Section 14(m) should be given the definition prescribed for that word in Section 2(2) of the Act. As so defined Section 14(m) plainly provides that the total compensation for injury, *that is disability and death*, shall in *no event* exceed \$7500.

The questions presented under this section of this petition have not been, but should be, settled by this Court in the public interest.

We submit that the correct interpretation to be given Section 14(m) of the Act is that given by Judge Nields in the District Court in the *Norton* case.<sup>4</sup> In that case Judge Nields held:<sup>5</sup>

"Throughout the Act the words 'injury or death' are used to embrace all the consequences of an accident

<sup>4</sup> *Travelers Ins. Co. v. Norton*, 24 F. Supp. 243.

<sup>5</sup> 24 F. Supp. 246.

whether disability, or death, or both. 'Injury' is defined to mean 'accidental injury or death,' not one or the other, but both. 'Compensation' is the remedy for 'injury or death,' meaning, of course, injury and death. It was clearly the intention of Congress to limit the liability of the employer for both injury and death to \$7,500. This is very apparent when we substitute for the words 'compensation' and 'death' in Section 14(m) the definitions of those terms given in the Act. Thus: The total money allowance payable to an employee or to his dependents [compensation] under this Act, and including funeral benefits provided herein, for injury or for death resulting from an injury [death] shall in no event exceed the sum of \$7,500."

Moreover the legislative history of the Act demonstrates that Congress intended Section 14(m) to provide an over all limit of \$7,500, as held by Judge Nields. We think it significant that the decision below and the *Lowe* and *Norton*<sup>6</sup> cases avoid any discussion of the legislative history of the Act.

While several members of Congress argued that the Act contained no limit in dollars, no one suggested that the \$7,500 limit of a total compensation in Section 14(m) of the Act created two limitations of \$7,500 for disability and \$7,500 for death. On the contrary, Congressman Boylan said, "I do not approve the limitation contained in the Bill *restricting the total amount to \$7,500.*" 65 Cong. Rec. Part. 5 (69th Congress, 2nd Session) pp. 5412, 5413.

We submit that Congress intended and the Act specifically provides in Section 14(m) that the "total compensation" payable for disability and death is \$7,500 and any other interpretation ignores the Congressional intent, the legislative history of the Act, cardinal rules of statutory construction and the specific definitions provided in the Act itself.

<sup>6</sup> In the Circuit Court of Appeals.

The decision below ignores the definitions of the terms of "compensation" and "injury" and gives to those terms different meanings than those Congress specifically prescribed in Section 2 of the Act. In disregarding the definitions contained in the Act the opinion of the court below conflicts with *Cardillo v. Liberty Mutual Ins. Co.*, 69 App. D. C. 330, 101 F. 2d 254, wherein it was said (p. 255) that, in construing Section 14(m) of the Act, "*the statutory definition should be applied*" as "there is no reason to suppose that the word (compensation) has one meaning in Section 14(k) and another in 14(m)."

The decision below and the cases of *International Mercantile Marine Co. v. Lowe*, 93 F. 2d 663, and *Norton v. Travelers Ins. Co.*, 105 F. 2d 122, actually hold that the term "injury" in Section 14(m) of the Act is synonymous with "disability." Such holdings do violence to the definitions given in the Act, the rule of construction announced in the *Cardillo* case, *supra*, and conflicts with *Kobilkin v. Pillsbury*, 103 F. 2d 667.

The Circuit Court of Appeals for the Ninth Circuit in the *Kobilkin* case held (p. 670):

"The terms 'injury' and 'disability,' separately defined in the Statute, are not synonymous."

This Court granted certiorari in the *Kobilkin* case<sup>7</sup> and in a Per Curiam opinion affirmed that case.<sup>8</sup>

Thus, the decision below has decided important questions of Federal law of general application throughout the United States, which have not been, but should be, settled by this Court, and has decided those questions in a way that conflicts with other decisions of the Circuit Courts of Appeal.

We submit that this is a proper case for certiorari, because this Court has held that questions concerning the

<sup>7</sup> 308 U. S. 530.

<sup>8</sup> 309 U. S. 619.



construction and enforcement of the Compensation Act constitute precedents of general application and are so important as to warrant certiorari. *Del Vecchio v. Bowers*, 296 U. S. 280, 285.

### III

The Longshoremen's and Harbor Workers' Compensation Act makes provision for third party recoveries in the event a third person is liable in damages on account of disability or death. The interpretation of this Section of the Act must be read in connection with existing legislation of Congress concerning the liability of third persons for damages for disability or wrongful death in the District of Columbia. *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530.

That Act provides, in Section 33, that "any amount recovered" under the third party provisions of the Act shall be distributed as follows:

- (1) "The employer shall retain an amount equal to
  - (A) expenses incurred by him \* \* \*;
  - (B) the costs of all benefits actually furnished \* \* \*;
  - (C) all amounts paid as compensation;
  - (D) present value of all amounts thereafter payable as compensation \* \* \*.

Thus, Section 33 makes the proceeds of a third party recovery available to pay "all amounts thereafter payable as compensation."

Paragraph 12 of Section 2 defines the term "compensation" as "the money allowance payable to an employee or to his dependents \* \* \* and includes funeral benefits." It follows that the proceeds of the third party recovery in the District of Columbia are available to pay compensation for injury and death. That seems to be the clear intent of Congress, particularly when we consider the

Wrongful Death Act <sup>9</sup> in force in the District when death occurred.

The Wrongful Death Act <sup>10</sup> provides that no action shall be maintained for wrongful death if the party injured has recovered damages for the injury during his lifetime. The theory of the Wrongful Death Act is that the widow and next of kin shall recover for the damages they sustain by reason of the wrongful act of another resulting in the death of their relative. The decisions have held that the Act provides only for the recovery of a pecuniary loss. Thus, the widow and next of kin, may recover only the pecuniary loss which they might reasonably expect to suffer because of the decedent's death. *Ramsey v. Ross*, 66 App. D. C. 186, 85 F. 2d 685, 686, 687.

It is, therefore, manifest why Congress prohibited a recovery on account of death if the injured person recovered damages during his lifetime. The reason being that in a personal injury action where permanent injuries are claimed, as in the third party case here involved, the jury are entitled to consider not only the pain, suffering and inconvenience which will arise in the future because of such permanent injuries, but are also authorized to consider and award damages for the loss of earnings growing out of such future disability. The jury in this case in the third party action here involved considered that Harrison Herlinger was totally disabled and lost his earning power over his normal expectancy as established by the mortality tables. Hence the \$27,000 verdict has made the injured party whole in his pecuniary loss, which, in contemplation of law, made whole his widow and next of kin, for any pecuniary loss they might suffer because of the disability of their relative and the loss occasioned by anticipated future disability and shortened life. In other words, Congress, where injuries are involved which result in death, has combined the actions for injuries and death in one action.

<sup>9</sup> *Supra*, pp. 7, 8.

<sup>10</sup> *Supra*, pp. 7, 8.

The question of whether or not the Compensation Act creates a separate cause of action for disability and a separate cause of action for death is immaterial. The third party provisions of the Compensation Act, when interpreted in the light of the District Wrongful Death Act, afford but *one* recovery, which *includes* compensation for injuries and such sum as the widow and next of kin would receive had no suit been filed for injuries and a death action been maintained. It necessarily follows that the proceeds of the third party recovery, which under the District of Columbia law, includes that sum representing the pecuniary loss which would flow to the surviving widow and next of kin, are available to pay compensation for disability and death. To reach any other conclusion would be to afford a double recovery on a single item of damages, which the Compensation Act is designed to avoid.

This Court has pointed out that, under Section 33 of the Compensation Act, it was not intended that the employer should assert only a part of the cause of action, and where the employer is given anything to recover, it is a full recovery that is conferred by the assignment provisions of the Act. *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530, 540.

This Court in the *Aetna Life Ins. Co.* case further held (p. 538) that not only does the statutory assignment vest in the employer "the full right to recover damages against the third person" but it seeks to avoid a "double recovery." In discussing the plan and purpose of the Act, this Court said (p. 542):

"That plan would be destroyed if the insurance company were denied the right of subrogation. For the consequence would be to permit that double recovery by either the employer or the next of kin entitled to compensation which the statute is careful to avoid, with the resulting increase in the cost of the insurance which the statute requires."

The decision below is the first reported case dealing with the distribution of a third party recovery under Section 33 involving disability and death. The proper application and administration of Section 33 of the Act is a question of national importance that has not been, but should be, settled promptly by this Court in the public interest. *Del Vecchio v. Bowers*, 296 U. S. 280, 285.

Moreover, we submit that the court below has not given proper effect to the decision of this Court in the *Aetna Life Ins. Co.* case.

#### IV

The court below has decided that petitioners are not entitled to any credit for advances made to the Herlingers during the lifetime of Mr. Herlinger. During Herlinger's life, there was advanced to him, out of the third party recovery, \$6,370.39 under the authority and direction of the Deputy Commissioner, and out of this advance a home was purchased by Mr. Herlinger for himself and his family, which home under his Will has become the property of the intervenor, Mrs. Herlinger (R. 4). In the event it should be decided that the over-all limit of compensation payable under the Act is \$15,000, and not \$7,500, then petitioners contend that they are entitled to a credit for such advance. Section 14(k) of the Act is specific and covers this aspect of the case. It provides that if advance payments of compensation have been made, the employer is entitled to be reimbursed.

It is submitted that the application of Section 14(k) of the Compensation Act presents a question of national importance that has not been, but should be, settled by this Court. *Del Vecchio v. Bowers*, 296 U. S. 280, 285.

## CONCLUSION

WHEREFORE, the petitioners respectfully pray the granting of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

CHARLES S. BAKER,  
WARREN E. MAGEE,  
BENJAMIN L. TEPPER,  
*Attorneys for Petitioners.*

January 11, 1943.

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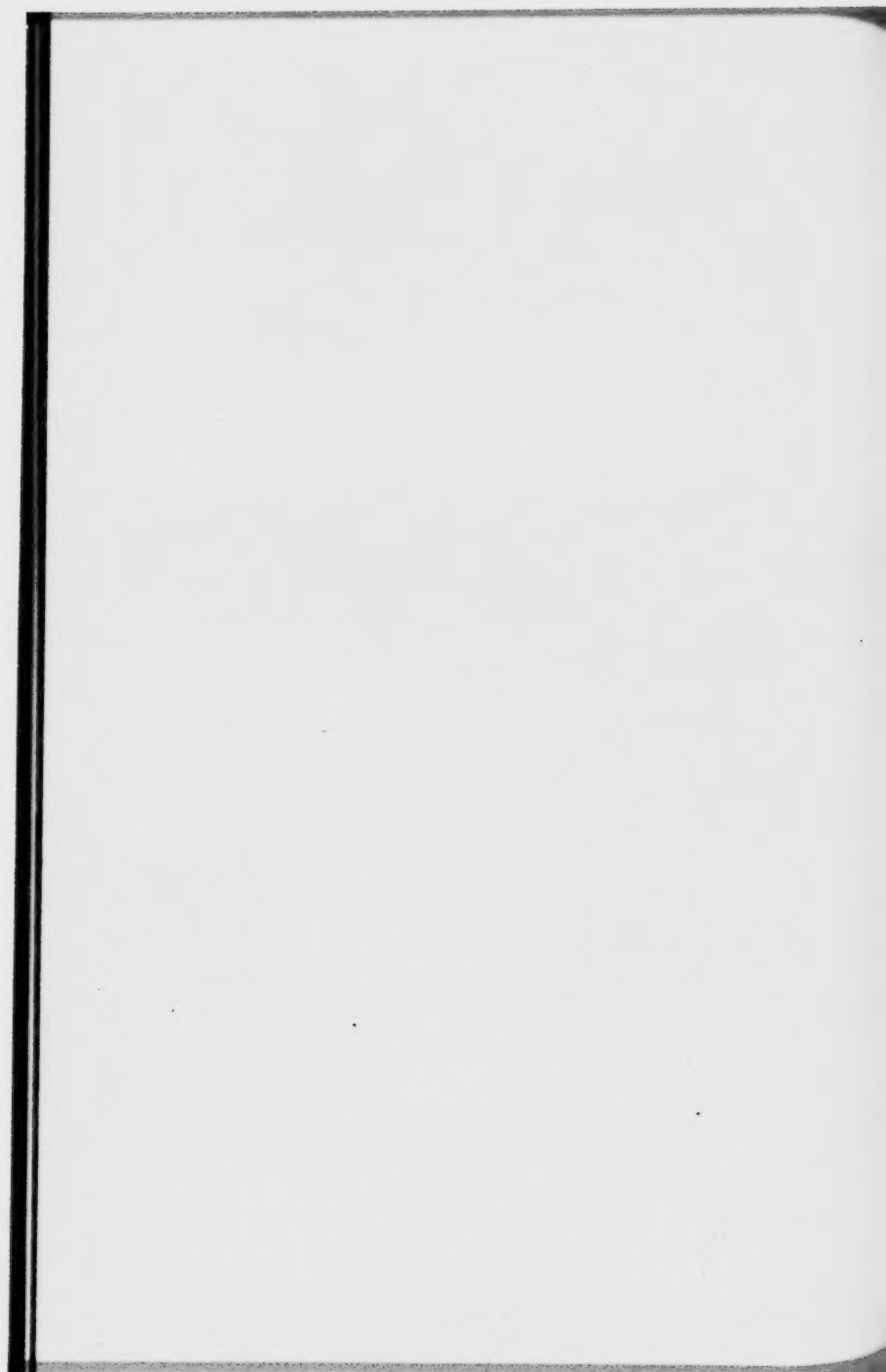
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1942

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No. 644

HENRY HITT, TRADING AS CONGRESSIONAL GARAGE,  
AND CENTURY INDEMNITY COMPANY, PETITIONERS

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER FOR  
THE DISTRICT OF COLUMBIA, UNITED STATES EM-  
PLOYEE'S COMPENSATION COMMISSIONER, AND  
WANDA V. HERLINGER, INTERVENER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA*

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## **BRIEF IN OPPOSITION**

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### **OPINIONS BELOW**

The opinion of the District Court (R. 17) is not reported. The opinion of the Court of Appeals for the District of Columbia (R. 19-22) is reported in 131 F. (2d) 233.

### **JURISDICTION**

The judgment of the United States Court of Appeals for the District of Columbia was entered



October 26, 1942 (R. 22). The petition for a writ of certiorari was filed January 11, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

(1) Whether the \$7,500 maximum prescribed in Section 14 (m) of the Longshoremen and Harbor Workers' Compensation Act applies to combined disability compensation and death benefits which are payable under the Act as a result of the same injury, or applies separately to disability compensation and to death benefits.

(2) Whether, in a case where an employee injured by a third party elects to take disability compensation under the Act and the employer, pursuant to statutory assignment of the employee's right of action, recovers from the third party a sum exceeding the employee's compensation, the employer is entitled, under Section 33 (e) (1) (D), to offset the amount of such excess against death benefits subsequently accruing to dependents upon the employee's death.

(3) Whether, under Section 14 (k) of the statute, the amount of such excess which has actually been paid to the employee may be credited against the death benefits accruing to his dependents on his death.

## STATUTES INVOLVED

The relevant provisions of the Longshoremen and Harbor Workers' Act are set forth in the Appendix.

## STATEMENT

This case arises under the provisions of the District of Columbia Workmen's Compensation Act of May 17, 1928 (45 Stat. 600, 36 D. C. Code (1940) § 501), making applicable to employees in certain employments in the District of Columbia the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U. S. C. §§ 901-950).

On July 31, 1934, Harrison Herlinger, an employee of petitioner Hitt, was accidentally injured through the fault of a third party (the Worcester Salt Company), when an automobile under which he was working in Hitt's garage, in the District of Columbia, fell upon him (R. 2, 5, 9, 10). Herlinger's injuries were severe and ultimately resulted in his death on September 5, 1939 (R. 10-11).

Prior to his death Herlinger elected to take disability compensation under the District of Columbia Workmen's Compensation Act, thereby assigning his cause of action against the Worcester Salt Company to petitioner Hitt, his employer, and by subrogation, pursuant to Sections 33 (a) (b) and (i) of the statute, to petitioner Century Indemnity Company, the insurance carrier (R. 11).

Petitioners sued the third party responsible for the accident and recovered the sum of \$27,000, from which they paid Herlinger compensation until his death<sup>1</sup> (R. 11-12). In addition to compensation, petitioners paid to Herlinger the sum of \$6,370.39 from the avails of the lawsuit, with most of which he purchased a home (R. 5, 11-12). At the time of Herlinger's death, after the carrier had deducted this advance, the compensation paid to Herlinger and "all expenses," it still held in trust for Herlinger the sum of \$4,011.02 with accumulated interest (R. 12).

Upon Herlinger's death, his widow, the intervener here, filed claim for death benefits under section 9 of the law on behalf of herself and two minor children (R. 11). After a hearing, respondent Cardillo, the Deputy Commissioner, issued a compensation order awarding \$200 as funeral expenses and compensation of \$12.76 per week to the widow and \$3.646 per week to each of the two minor children (R. 9, 11-13). Respondent also found that the sum of \$4,011.02, the unexpended balance of the third party recovery in the hands of the insurance carrier, should be paid to Herlinger's legal representative, pursuant to section 33 (e) (2) of the statute (R. 12).

Petitioners then brought a proceeding in the United States District Court for the District of

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<sup>1</sup> The record does not show the aggregate amount of this compensation, but petitioners state that it was \$6,417.84 (Pet. 2).

Columbia for a review of the compensation order pursuant to section 21 (b) of the statute, seeking to enjoin its enforcement (R. 1-8). A joint motion by respondent and the intervener to dismiss the complaint was granted on August 4, 1941 (R. 14-17). The District Court held that the order was sustained by the evidence and in harmony with the pertinent judicial precedents (R. 17); its decision was affirmed by the Court of Appeals for the District of Columbia (R. 19-22).

#### ARGUMENT

(1) Section 8 of the Longshoremen's and Harbor Workers' Compensation Act accords "compensation for disability" to an employee who suffers injury in the course of his employment; and Section 9 confers "death benefits" upon certain specified dependents "if the injury causes death." Section 14 (m) provides:

"The total compensation payable under this Act for injury *or* death shall in no event exceed \$7,500." (Italics supplied.)

The decision of the court below that the \$7,500 maximum applies separately to the disability compensation payable to an employee for an injury, under Section 8, and to the death benefits due to his dependents upon his death therefrom, under Section 9, is in harmony with the holding of the two circuit courts of appeals which have passed on the question. *International Mercantile Marine Co. v. Lowe*, 93 F. (2d) 663 (C. C. A. 2);

*Norton v. Travelers Insurance Co.*, 105 F. (2d) 122 (C. C. A. 3). In the *International Mercantile Marine* case, a petition for certiorari was filed and denied, 304 U. S. 565. That petition presented substantially the same arguments as are raised by petitioner on this phase of this case, and there are no circumstances which would impel the granting of a writ here to review that issue which were not present in the former case.

The decisions of the three courts ~~is~~<sup>are</sup> supported by the literal language of the Act, for it cannot be assumed that the disjunctive "or" was used inadvisedly or was intended to have other than its normal meaning. Moreover, the structure of the Act shows that the employee, under Section 8, and his dependents, under Section 9, were to be given independent protection.

Petitioners urged that the word "injury" in Section 14 (m) should be construed in accordance with the definition in Section 2 (2) as meaning "accidental injury or death."<sup>2</sup> But in view of the fact that the phrase in Section 14 (m) is "injury or death," it is apparent that the word "injury" as used there was not intended to include "death."<sup>3</sup>

<sup>2</sup> This argument was made and rejected in the *Norton* case, *supra*.

<sup>3</sup> Insertion of the definition of injury in Section 14 (m) would cause that paragraph to read "The total compensation payable under this Act for accidental injury or death or death shall in no event exceed \$7,500." Insertion of the definition of "death" found in Section 2 (11) would only add to the confusion. Obviously, in such circumstances, the words "injury" and "death" were intended to have their normal meaning in Section 14 (m).

That "injury" was often used in its normal sense, as distinguishable from death, is indicated by many other sections of the Act.<sup>4</sup> See §§ 5; 12 (a), (b) and (d); 13; 14 (b), (d) and (g); 19 (a); 30 (a), (e) and (f); 32 (b); 33 (f); cf. §§ 3 (a) and 33 (a).<sup>5</sup> The acceptance of petitioner's construction would open a wide gap in the protection provided for dependents whenever a lingering injury subsequently results in the employee's death.

2. Section 33 of the Act provides that if a person other than the employer is liable in damages for the injuries suffered, election by the employee to receive compensation under the Act acts as an assignment to the employer of the employee's right of action against the third person. The employer may institute proceedings for the recovery of such damages, and may retain from the amount recov-

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<sup>4</sup> "Injury" is not the only word defined in the statute whose meaning must vary in accordance with the text in which it is used. The same is true of the word "compensation." See *Cardillo v. Liberty Mutual Ins. Co.*, 101 F. (2d) 254 (App. D. C.). Petitioners contend that the decision below conflicts with the *Liberty Mutual* case, but the Court of Appeals properly held that the latter decision supported its views rather than the contrary.

<sup>5</sup> For example, in connection with the notice required by Section 12 (a) within thirty days after "injury or death," § 12 (b) provides:

"Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf."

ered a sum equal to the cost of the proceeding, all benefits or compensation previously paid, and, in a trust fund, to meet future payments "the present value of all amounts thereafter payable as compensation." Any "excess" remaining is to be paid over to the person entitled to compensation or to his representative.

From the proceeds of the \$27,000 third party recovery, petitioners paid Herlinger, during his lifetime, the disability compensation owing to him under the act and an additional sum of \$6,370. When he died, petitioners, after deducting "all expenses" still held "in trust" for Herlinger \$4,011 of the "excess" proceeds owing to him. Petitioners contend that if they are required to pay an additional \$7,500 as compensation for death, the proceeds of the third party recovery—that is, the \$6,370 already paid and the \$4,011 still due—may be availed of to satisfy the liability to his dependents.<sup>6</sup>

This argument is necessarily predicated on the assumption that an employee and his dependents do not have separate rights under the Act, and that

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<sup>6</sup> This question has arisen in no other case, and because of its peculiar nature probably will not be sufficiently frequent to be of general importance. The problem would only arise where there was first disability, then death from the same injury, and in addition a third-party recovery in excess of the total compensation payable under the Act. That such cases are unusual is indicated by the testimony before the House Committee on the Judiciary on S. 3170, 69th Cong., 1st Sess., p. 162.

an employer's suit on behalf of a living employee also asserts the interest of the latter's dependents.<sup>7</sup> However, when the employee elects to take compensation, his personal right of action against a third person, and no more, is assigned to the employer by Section 33 (b). Cf. *Doleman v. Levine*, 295 U. S. 221. The right to death benefits is conferred by Section 9 exclusively upon dependents and, indeed, during the life of the employee is non-existent or at most contingent. It accrues only if the employee's death results from the injury. The right may never arise or vest, depending not only upon the cause of death, but also upon the existence of eligible dependents. Cf. §§ 44 and 33 (c). Moreover, since any such right belonged to the dependents, and not the employee, it was not subject to assignment by him. It was thus not covered by Herlinger's assignment to the employer, and the latter is not authorized to credit recoveries on the employee's claim actually assigned to him against subsequent liability on the dependents' claim which was not.

Petitioners stress the language in Section 33 (e) (1) (D) permitting the employer to retain "the present value of all amounts thereafter payable as compensation." But, where the recovery is upon the employee's right of action, while he is still alive, the phrase "all amounts thereafter payable as

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<sup>7</sup> This assumption would appear to be inconsistent with the cases cited on pp. 5-6, *supra*.



compensation" refers only to the compensation payable to the employee himself. This must follow from the requirement that the "*present value*" of the "compensation thereafter payable" be computed. As in the case at bar, it would ordinarily be impossible to determine at the time of the recovery against the third party whether the employee would die from the injury or from some other cause, upon which would depend his dependents' rights to any death benefits at all, and equally impossible to forecast the time of the employee's death, and consequently the number and relationship of his dependents at death, in accordance with which the amount and distribution of any death benefits due would vary. Congress could hardly have meant that the computation of the excess due to the employee from a third-party recovery should await his death, for in that case the employee would never personally obtain any of the excess. The Act obviously contemplated that he, and not his dependents, receive the excess computed as of the time of the employer's recovery. And petitioners' position can be no better simply because they still retained a portion of the excess at the time of Herlinger's death. When Herlinger died, his representative, not his dependents, was entitled to the excess under the specific wording of the Act.<sup>s</sup>

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<sup>s</sup> Section 33 (e) (1) (D) and (2) provides that the payment shall be to "the person entitled to compensation" or to his "representative," not to the persons entitled to benefits under Section 9. This is in marked contrast to the provision

Petitioners seek to avoid these difficulties by referring to the proviso in the District of Columbia Wrongful Death Act prohibiting an action thereunder by the representative "in any case when the party injured \* \* \* has recovered damages therefor during the life of such party." That Act is not applicable here, in view of the definite provisions of the Longshoremen's and Harbor Workers' Compensation Act. Certainly, Congress would not have intended the availability of death benefits under the latter Act to depend upon the varying provisions of state or local wrongful death statutes.

There is no basis for petitioners' argument (Pet. pp. 14-15) that the decision below permits any double recovery of damages for the same liability. The common law recovery upon Herlinger's cause of action did not include the elements of his dependents' statutory death benefits. The only lost earnings for which he could sue were those occurring during his lifetime. The essence of the death benefits provided in the statute for dependents is the loss of the employee's earnings after his death.

Petitioners also urge that under Section 14 (k) the \$6,370.39 of "excess" proceeds paid to the employee from the third party recovery constitute "advances" deductible from death benefits payable to his dependents. Section 14 (k) provides:

that unpaid installments of disability compensation (other than total disability compensation which is payable "during the continuance" of total disability) shall be paid to his dependents upon the employee's death from causes other than injury. §§ 2 (d) and (i).

If the employer has made advance payments of *compensation*, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation *due*. (Italics supplied.)

This section is inapplicable both for the reasons advanced above and because a payment out of excess proceeds is not a payment of "compensation" within the meaning of the Act, but is payable in addition to compensation. Furthermore, when petitioners paid the \$6,370 of excess proceeds to Herlinger, there were no unpaid installments of compensation "due" to his dependents, and it could not even be foretold whether any would ever be due to them. See pp. 9-10, *supra*.<sup>9</sup>

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<sup>9</sup> Petitioners apparently think it of some significance that Herlinger used the sum to buy a home which upon his death became the property of his wife. But this fact did not convert the payment into compensation under the Act. Its status would have been no different if Herlinger had spent the money during his lifetime for his own personal benefit, as he had a right to do.

CONCLUSION

The decision below was correct and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

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FEBRUARY, 1943.

## APPENDIX

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. 901, *et seq.* (The provisions are set forth below as they appear in the Code.)

### § 902. Definitions.

When used in this chapter—

\* \* \* \*

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

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(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

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§ 908. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

\* \* \* \* \*

§ 909. Compensation for death.

If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

\* \* \* \* \*

§ 914. Payment of compensation.

\* \* \* \* \*

(k) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

\* \* \* \* \*

(m) The total compensation payable under this chapter for injury or death shall in no event exceed the sum of \$7,500. (Mar. 4, 1927, ch. 509, § 14, 44 Stat. 1432; May 26, 1934, ch. 354, § 4, 48 Stat. 807; June 25, 1938, ch. 685, § 7, 52 Stat. 1167.)

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§ 933. Compensation for injuries where third persons are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commissioner may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order

filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Commission, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by

the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this chapter is minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the pay-



ment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section (Mar. 4, 1927, ch. 509, § 33, 44 Stat. 1440; June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168). \* \* \*

